The
BAR ASSOCIATION BULLETIN

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THE BAR ASSOCIATION BULLETIN

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"Particular Matters in Pleading and Practice Before the Presiding Judge of the Superior Court"

By JUDGE ELLIOTT CRAIG

[*For the purpose of this printing, the paper has been reduced to direct legal matters presented.*—EDITOR.]

This paper was prepared by request and for a purpose. I hope that in at least some small way it meets that purpose; if it does so, even though ever so little, the accumulations of that little result will spread and amplify and a bit of unnecessary work of the bench will be lessened to that extent and I shall feel well repaid for my efforts in the preparation.

In first outlining this paper I took the Code of Civil Procedure section by section and listed those which I deemed proper for mention herein:

Section 17, C. C. P., provides, among other things:

> "Certain terms used in this Code defined * * * signature or subscription includes mark, when the person cannot write, his name being written near it by a person who writes his own name as a witness; provided, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto."

Many documents affected by above provision fail to conform thereto. I believe that "any sworn statement" includes complaints, answers and petitions of all kinds (when verified), as well as affidavits.

In passing, let me call attention to Rule XIV of the Superior Court, reading as follows:

> "No order of any kind shall be made or entered by any Judge of this Court unless upon the personal motion of a member of the bar authorized to appear in this court, except by the Judge upon his own motion, or upon the application of a party appearing in propria persona."

The syllabus of the case of De Recat Corporation vs. Dunn, et al., 71 Cal., Decisions, page 116, decided by our Supreme Court on January 15, 1926, reads as follows:

> "Trial—Attorney and Client—Resignation of Attorney—Construction of Section 286, Code of Civil Procedure—Section 286 of the Code of Civil Procedure, which provides that 'when an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person', does not apply to a case where a practicing attorney for any reason declines to go on with a particular case while still continuing in practice, but the plain meaning of the statute is to provide for cases in which the attorney, by reason of death, disability, or other

cause, has ceased to practice in the court and his refusal to proceed in a particular case is not ceasing 'to act as such' attorney and it does not even disconnect him with the case, for that can only be accomplished by consent of the parties, or of the Court, or by the regular proceedings for the substitution of another."

Section 284, C. C. P., provides as follows:

"Change of Attorney. The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination as follows:

"(1) Upon consent of both client and attorney, filed with the Clerk or entered upon the minutes;

"(2) Upon the order of the Court, upon the application of either client or attorney, after notice of one or the other."

The proper method under subdivision 2 is a regular motion on five days' notice as required by Section 1005, C. C. P., from one to the other for hearing in Dept. 15, the present law and motion department; and Section 285, C. C. P., provides:

Notice of change:

"When an attorney is changed as provided in the last section, written notice of the change and of the substitution of a new attorney or the appearance of the party in person must be given to the adverse party. Until then he must recognize the former attorney."

Guardian ad litem of infants:

Section 373, C. C. P. (subdivisions 1 and 2):

"When a guardian ad litem is appointed by the Court he must be appointed as follows:

"(1) When the infant is plaintiff, upon the application of the infant, if he be of the age of 14 years or if under that age, upon the application of a relative or friend of the infant.

"(2) When the infant is defendant, upon the application of the infant if he be of the age of 14 years and apply within ten days after the service of the summons, or if under that age or if he neglects so to apply then upon the application of a relative or friend of the infant or of any other party to the action."

The comment on this section is that where the infant is of the age of 14 years, said *infant must apply*, excepting only the exception stated in the Section, of his failure to apply within ten days after service of the summons.

Section 411, C. C. P.:

"The summons must be served by delivering a copy thereof as follows: * * * (3) if against a minor under the age of 14 years residing within this state to such minor, personally, and also to his father, mother or guardian, or there be none within this state then to any other person having the care or control of such minor or with whom he resides or in whose service he is employed. * * * (7) In all other cases to the defendant, personally."

By unanimous decision of our Supreme Court speaking in the case of Akley vs. Bassett, 189 Cal. 625, it is held:

"The provision of Subdivision 3 of Section 411, C. C. P., requiring personal service of summons upon minors under the age of 14 years residing within the state and also upon his father, mother, guardian or other person designated by the statute is mandatory. Without such completed service the court acquired no jurisdiction over the infant for any purpose. As such service was not had, the defect was not cured by the appearance of any one of such persons other than the minor, in his or her own behalf. The court had no right in such case to appoint a guardian ad litem for the infant and the acts of such guardian as to the infant were void and of no effect."

Section 405, C. C. P., provides as follows:

"Civil actions in the courts of this state are commenced by filing a complaint."

The court has no control or power in such civil action until the action is commenced because the plaintiff is not in court. How therefore can the court issue any form of order or process before the complaint is filed? This is referred to because of the number of applications for orders made to the Presiding Judge before the complaint is actually filed.

Section 409—Notice of pendency of an action affecting the title to real property:

"In an action affecting the title or right of possession of real property the plaintiff at the time of filing the complaint and the defendant at the time of filing his answer when affirmative relief is claimed in such answer or at any time after may record in the office of the County Recorder of the county in which the property is situated a notice of the pendency of the action containing the names of the parties and the object of the action or defense and the description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action and only of its pendency against parties designated by their real names."

It is surprising how many actions are brought on for hearing without recordation of notice of pendency. Many complications arise from such failure and result in additional and subsequent actions to further clear the title. However, in actions for foreclosure of mechanics' liens no notice of pendency of action is required, as is held in the case of Tulloh vs. Bryce, 37 Cal. App. 761, the Court there saying: "By implication this provision (referring to Section 1190, C. C.

P., and also constitutional provision on mechanics' liens) means that when proceedings are commenced within the time designated, the lien continues, rendering it unnecessary to file a notice of the pendency of the action." This principle of law was expressly approved by the Supreme Court in an opinion given on denial of motion for hearing before it and also has been directly approved by the Supreme Court in Sax vs. Clark, 180 Cal. 287.

Section 411, C. C. P., is the provision providing the manner in which summons must be served. I have already mentioned service on infants and I might well discuss the whole section, but I will here call particular attention only to subdivision (1):

> "If the suit is against a corporation formed under the laws of this state: to the president or other head of the corporation, vice-president, secretary, assistant secretary, cashier or managing agent thereof."

Please note that "director," "treasurer," "trust officer," "chief teller," "ast. cashier," as well as many other common designations of corporation officials and employees are not included in the enumerated list. Of course, the designations in the section of "head of the corporation" and "managing agent" are very broad, but the affidavit of service must meet the requirements of the statute, otherwise a default judgment thereon will be void on the face of the judgment roll. In the affidavit of service, please do not say, "John Doe, President of John Doe Company, a corporation," for here the statement of "President," etc., is merely descriptive of the man served and not a statement of service on the corporation. One of several proper forms is, "John Doe Company, a corporation, by serving John Doe, its president, as such president." Return of service, of course, becomes immaterial on appearance of the defendant, but there are hundreds of default matters every year where the form of the return is very material. Do not trust the affidavit of service solely to inexperienced clerks and process servers. This trouble can be completely ended by each attorney inspecting the affidavit of service before the summons is filed.

Sections 412 and 413, C. C. P., refer to service of summons by publication. I think that one of the hardest duties of the Presiding Judge in his daily contact with attorneys is on the matter of orders for publication of summons. Strict compliance with the statute is required. Superior Court rule No. XXVII requires:

> "If the residence is known and stated in the affidavit, the affiant must also give the information upon which such statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit."

Section 412, C. C. P., states in part:

> "and it *also* appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made," etc.;

and, Sec. 412 also requires affidavit re certificate of residence in office of County Recorder in cases where defendant cannot, after due diligence, be found within the state. Forms of affidavit for publication of summons are furnished free in the Clerk's office and should be used when possible, but in using this form please bear in mind that there is a difference between "resides out of the state," "has departed from the state," "cannot, after due diligence, be found within the state," and "conceals himself to avoid service of summons," the four expressions are in the disjunctive and the affidavit should be framed on the appropriate one of the four and phrased accordingly. The form of affidavit of merits printed on the back of the affidavit form furnished by the Clerk meets the above requirement that it appear to the Court that a cause of action is stated, etc., and saves the Presiding Judge the reading of the complaint to determine this fact.

As to length of time of publication, Sec. 413, C. C. P., reads in part:

> "and for such length of time as may be deemed reasonable, at least once a week, but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months."

Note that the minimum of two months is "residing out of the state or absent therefrom"; no minimum other than once a week is prescribed in the other two cases, to-wit, "cannot, after due diligence, be found within the state" and "conceals himself to avoid service of summons." When the defendant is located so far distant from here that the minimum of two months is not sufficient for the mailed copy of summons and complaint to reach defendant and for defendant to have time to communicate with local counsel, the Court will fix three months or other proper time. In cases where defendant is within the U. S. two months, the minimum, is ordinarily fixed by the Court. In case of "cannot after due diligence be found" the Court ordinarily

fixes two months, not as a code minimum, but as a reasonable time under the circumstances and assuming the defendant to be somewhere within the United States.

Coming to "conceals to avoid service," no minimum is prescribed. This situation arises generally in unlawful detainer cases, particularly on apartment house leases where the leasee hides out and leaves an agent to run the apartment house and collect as much as possible and pay out nothing before the "crash." The affidavits must be strong and satisfactory to the Court, but when such situation is so made to appear there is no legal reason, as far as I know, why the Judge cannot fix once a week for *one week* as the time for publication, if the concealment be shown to be within the state; then at end of publication period (and mailing as ordered by the Court) the service of summons is complete and defendant's default may be entered after same time as after personal service within the state.

The expression "after due diligence" is very general, but it has a meaning and a reasonable search must be made to locate defendant and this must appear in the affidavit.

I quote from Vol. 21, page 504, of Calif. Juris., as follows:

> "Between the statute and affidavit there is said to be a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. If the affidavit upon which an order for publication is made is insufficient in respect to the statement of facts essential to justify publication, the Court acquires no jurisdiction and the judgment is void and it will be declared so on a collateral, as well as on a direct attack."

(Continued in Next Issue)

Message of the Los Angeles Ch of t of Certified P Acc

There have been three clearly defined stages in the development of Certified Public Accountancy. Originally, there was the Accountant, whose work was defined as early as the decade in which Columbus discovered America as intended "to give the trader, without delay, information as to his assets and liabilities". At first, the accountant devoted himself to recording accountancy—assembling financial facts; this developed into constructive accountancy; and finally came the advance to analytic accountancy, that is, the broadening of the science to assist in determining future business policy from a scientific analysis of past financial experience. The distinctive feature of the accountant's work was that it was private.

Then, about the middle of the last century, we find the Public Accountant. The theretofore private accountant now rendered a service to different clients in different lines of business. The work broadened to the more constructive service of devising and installing methods of accounting

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of the California State Society Accountants

and cost accounting peculiarly suitable to individual organizations. The Public Accountant acquired those constructive and analytical attainments that made his service to the public a professional service.

Along with this development of Public Accountancy came the constant advance in the professional character of the work, as well as the public necessity that those who practice this profession should have a distinctive title and their right to practice carefully safeguarded by law. Consequently, it has come about that in every part of the United States Certified Public Account Laws have been enacted, under the provision of which properly accredited accountants are certified by state authority. Public welfare demands that the work of the Public Accountant shall be dependable.

The result has been the establishment of Public Accountancy as a profession and the public designation of those who are competent to carry on this profession as "Certified Public Accountants".

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Los Angeles Bar Association

Regular Monthly Meeting and Dinner, Hotel Alexandria, Thursday, May 27, 1926, at 6 P. M.

The Program Committee of the Bar Association announces the following most interesting debate for the meeting of the Association, Thursday evening, May 27:

LEGAL ASPECTS OF CALIFORNIA SYNDICALISM ACT

IN FAVOR OF PRESENT STATUTE—HON. BENJAMIN F. BLEDSOE
FOR MODIFICATION OF THE ACT — LEON R. YANKWICH, ESQ.

Open discussion will follow debate.

Proposed Amendments to By-laws

[ED. NOTE.—*The Board of Trustees have adopted a resolution creating a Standing Committee on Judicial Selection, to conduct the Bar Association plebiscites. This necessitates an amendment of the By-laws. The Special Committee of the Board of Trustees composed of Messrs. John Hart, Leonard B. Slosson and Guy R. Crump, proposes an amendment that the Committee be composed of the four last ex-Presidents of the Association, and five members elected at large; others, headed by Mr. Kemper Campbell, propose an amendment that the nine members of the Committee be elected at large. Copies of the proposed amendments have been mailed to members by the Secretary. The wisest amendment will be adopted at the meeting. Herewith follow arguments; may the fittest survive and their tribes increase.*]

PROPOSED AMENDMENTS TO BY-LAWS OF THE ASSOCIATION

By GUY R. CRUMP

John W. Hart, Leonard Slosson and G. R. Crump were recently appointed by the President as a committee to recommend amendments to the By-Laws with reference to the taking of plebiscites and the selection and election of judges. This committee held several meetings and agreed upon two amendments to Article VIII of the By-Laws to be submitted to the Association at its next meeting.

The first of these amendments, which is too long for insertion here, provides for a committee to be known as "Committee on Judicial Selection" consisting of nine members, four of whom shall be ex-presidents of the Association and the other five elected by the members of the Association annually; this Committee to be charged with the duty of gathering information concerning the qualifications of candidates for judicial office and furnishing such information to the members, together with a statement of the opinion of the committee as to whether candidates are, or are not, qualified; also of endeavoring to induce fit candidates to stand for election or appointment.

The second proposed amendment gives

Proposed Changes in the Conduct of Plebiscites for the Indorsement of Judges by the Bar Association

By KEMPER CAMPBELL, *Senior Vice-President*

In my opinion, the two proposed amendments adding a section to Article VIII, to be numbered 15, should be defeated.

The proposed amendment to Section 3 of Article VIII should be adopted.

The effectiveness of any organization depends entirely upon the mental attitude of its members. We have labored now for several years to restore the confidence of the bar generally in the Bar Association and to instill into the organization a spirit of democratic idealism and fraternity. Every member of the Association now has his vote upon every question of importance that is determined. I know of no privilege that is prized more highly by the individual member than active participation in voicing the sentiments of the Association with respect to the qualification of judges. If we adopt these proposed star chamber methods of condemning candidates, we will, in my opinion, utterly destroy by this one mistake what we have so laboriously struggled to build up. It is evil enough in principle to turn over to any nine men, however well intentioned, the power to effectually foreclose the candidacy of any member of this Bar aspiring to judicial of-

authority to the Board of Trustees to conduct a campaign in favor of candidates endorsed and in opposition to any candidate not endorsed.

On at least one occasion, the ballots sent to members in a plebiscite for judges were accompanied by biographical sketches, and it may be that the By-Laws of the Association as now written are sufficiently broad to permit all that the first amendment seeks to provide for, but the Board of Trustees wishes to submit to the Association the proposed amendments to the By-Laws to provide specifically for the gathering of information and submission thereof to the members. This is the purpose of the first resolution. It will be noted that while the committee is authorized to express its opinion as to whether candidates are qualified or not, it is prohibited from making any recommendations as between candidates whom it finds qualified.

I can see no objection to the amendment except possibly as to the makeup of the committee. No doubt it would be more democratic to have the entire committee, instead of a majority, elected from the membership of the Association, but the proposers of the amendment were of the opinion that by having the committee composed in part of ex-presidents (the majority being elected annually from the membership of the Association), its action would be freed from any influence by way of a political campaign in the Association itself in favor of certain candidates who might consider such a campaign proper, where others would wish the candid opinion of the Bar as to their merits uninfluenced by the importunities of their friends and supporters. The principal thing is to create a committee which will be absolutely fair and impartial and have the courage to say what it thinks. This the proposed committee should be able and willing to do.

It is not a pleasant task for any person or committee to publicly state that in his, or its, opinion a particular candidate does not possess a judicial temperament or is otherwise unfitted for a place upon the bench. The standing at the Bar of ex-presidents of the Association is such that their opinion on the subject, concurred in by the majority members of the committee selected by the membership at large, should be free from any suggestion of bias or partiality. Irrespective, however, of how the committee is made up, some method should be adopted which will place before the members of the Association fice, but it is doubly unfortunate that in the choice of four of the nine (and no doubt the most influential) the members of the Association have no part. These constitute a House of Lords, so to speak, exercising this office not because they were elected by the membership so to do, but because they happened years before to have been selected by the membership for some other purpose.

They have, without exception, treated me personally with greatest consideration and kindness and I do not wish here to be understood as expressing anything of personal criticism of any of them. Indeed, I do not know that these gentlemen have been consulted as to whether they would accept a place on such committee if offered and I very much doubt that they would do so. I condemn the proposal because it is wrong in principle. It is not democratic, it is un-American and it does not conduce to that spirit which is so essential to the success of very organization such as ours.

I am likewise opposed to the second, or alternative amendment providing for a star chamber committee of nine, said committee having the power to "investigate the qualifications of all candidates" for certain judicial offices and to determine which ones are "deemed qualified." Experience has shown that although an intelligent vote in the plebiscite ordinarily requires inquiries to be made, yet results of these plebiscites indicate that inquiries *are* made and the voting has been discriminating and intelligent. The results have been far better than could be expected from a committee of nine men with limited acquaintance in the Bar and subject to the peculiar fallibility and the hasty and unfortunate conclusions that so frequent emanate from committees of endorsement. I believe that the combined knowledge of the rank and file of the Bar is a safer measure of judicial fitness than is the judgment of nine of its isolated members.

And more important than all is that faith which the members of the Bar must have in the endorsement itself in order that its result may be transmuted into a forceful public opinion. Rightfully or wrongfully, small committees of endorsement are always accused of being influenced by some individual or clique and the Committee receives so much condemnation that the whole effort goes for naught in the public mind. Our "hand-picked" candidate would be easily defeated at the polls if their candidacies traced their

with each ballot a brief biographical statement, as is done by the Bar Associations in Cleveland, Chicago and other large cities, which are coming more and more to take an active and salutory interest, not only in the election of competent judges, but in keeping competent men upon the bench and freeing them from the expense, trials and difficulties of building up an organization for a campaign for re-election. The Bar is further interested in the subject from the standpoint of delays in the administration of justice occasioned by incumbent judges having to devote a large part of their time for a period of several months preceding an election in trying to retain their places.

The second amendment authorizes the Board of Trustees to conduct a campaign for the election of candidates endorsed by the Association, and in opposition to the election of any candidate or candidates not so endorsed. Experience has shown that the mere endorsement of the Association not followed up by active work is of comparatively little value. An effective campaign cannot be made unless the Association is prepared, not only to support its candidates, but to oppose such candidates, if any, as in the opinion of the members of the Association are not qualified.

parentage to a committee of nine and their conception to Star Chamber proceedings.

I strongly favor the adoption of the amendment to Section 3 of Article VIII, which imposes upon the existing judiciary committee the duty to "print and furnish with the ballot for the information of the members of the association data submitted by each candidate, including his age, period of practice in California, extent and nature of his education and such other facts as may be of value in determining the qualifications of the candidate for the office sought, together with the names of ten (10) practicing attorneys who sponsor his candidacy, said data not to exceed 150 words."

This information will supplement that already possessed by the members, will furnish suggestions for further inquiry, will reveal the names of those sponsoring the candidacy of the judicial aspirant and will allow each member of the Association to have his full voice in determining the endorsement. With the added information provided for by this proposed amendment, even more gratifying results will be obtained and the priceless esprit de corps of our organization will be preserved.